The State of South Carolina

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

HONORABLE JOHN W. CREWS, JUDGE

CITY OF COLUMBIA, Respondent,

against

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE, and JOHNNY CLARK, Appellants.

APPELLANTS' BRIEF

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

QUESTIONS INVOLVED

I. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?

B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?

II. Did the State fail to establish the *Corpus Delicti* or prove a *prima facie* case? (Exceptions 1, 2.)

STATEMENT

This is an appeal from an Order of Honorable John W. Crews, Associate Judge, Richland County Court, dated April 28, 1961, affirming convictions of the Appellants in the Recorder's Court of the City of Columbia.

Appellants were charged with the violation of Section 16-386 (Trespass) and Section 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended. The charges arose out of efforts on the part of Appellants to obtain lunch counter services in the Taylor Street Pharmacy, located in Columbia, on the 15th day of March, 1960.

Trial by jury was waived, and Appellants were tried before Columbia Recorder John I. Rice on the 30th day of March, 1960. Appellants were found "guilty as charged, and they will be fined the sum of $100.00 on each charge, of which amount the sum of $24.50 will be suspended on each charge."

Thereafter, by consent, the appeal from this trial was consolidated with a similar appeal from the Columbia Recorder's Court and argued before Honorable John W. Crews, Associate Judge, Richland County Court. In the Order from which this appeal is taken, the judgment of the Recorder's Court was affirmed. Due and timely notice of appeal from this Order was given.

Appeal from Richland County

ARGUMENT

Question I

Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of Appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State action within the meaning of the Fourteenth Amendment?

1. The evidence presented is to the effect that Taylor Street Pharmacy is a large store which sells numerous items to the public (Tr. p. 22, ff. 86-87). It invites all members of the public onto its premises to do business and serves alike all persons who respond to the invitation to do business courteously and without regard to race (Tr. p. 23, f. 87) except at its lunch counter, which is operated for white persons only (Tr. p. 24, f. 94.)

When these appellants entered the lunch counter area of the store, they took seats and shortly thereafter they were requested to leave (Tr. p. 21, f. 81). Even a casual perusal of the record will demonstrate the extent to which the police of the City of Columbia and of the State of South Carolina were inextricably intertwined in the plan and scheme which ended in the arrests and convictions of appellants.

Indeed, the police informed the store manager that Negroes would enter his business (Tr. p. 26, f. 101). Thereafter, store manager and police agreed in advance of the arrival of appellants that they would be arrested (Tr. pp. 28-29, f. 112, *et seq.*):

"Q. You told them to move and they refused, did you ask them to arrest them?

A. We had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing."

Again, Mr. Terry, the store manager, concluded his testimony as follows (Tr. p. 30, f. 118):

"Q. Was it your idea to have these defendants arrested, or was it the idea of the police department?

A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested."

An agent of the South Carolina Law Enforcement Division testified (Tr. p. 4, f. 14):

"Q. What happened then?

A. I requested that Mr. Terry go to each individual and ask him to leave, in my presence, and he went to each one and asked him to leave, that he wasn't going to serve them. * * *"

And again (Tr. p. 5, ff. 18-19):

Q. "What did you do then?

A. Well, I gave them, I couldn't say exactly how long, but several minutes, after Mr. Terry had left the section, to see what they were going to do and they just sat there. * * * I walked in the middle of those and told them, I believe the words I used, that I was a State Officer and they had been asked to leave and they didn't so they were under arrest. That's when they got up and followed us out."

It is respectfully submitted that the evidence presented in this matter shows conclusively that by ar-

resting the appellants, the officers of the City of Columbia were aiding and assisting the management of Taylor Street Pharmacy in maintaining its policy and, indeed, the policy of the City of Columbia and of the State of South Carolina, of racial segregation. Therefore, the arrests and conviction of appellants under the circumstances shown herein contravene the Fourteenth Amendments interdiction against State enforced racial segregation. 17

Beyond all doubt, the City of Columbia cannot make it a crime for a Negro to seek service at a lunch counter reserved by custom for white persons or for white persons and Negroes to be served at such counter at the same time, for such a law is a state law commanding segregation. *Gayle v. Browder*, 352 U. S. 903, 1 L. Ed. (2d) 114, 77 S. Ct. 145; *Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752, appeal dismissed, 351 U. S. 901, 100 L. Ed. 1439, 76 S. Ct. 692; *Holmes v. City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141. It is respectfully submitted that here, the City has attempted to do the same thing under the guise of naming the offense "trespass after warning." Their arrests and convictions were based upon race only and are therefore incompatible with the Fourteenth Amendment to the United States Constitution. 18 19

The application of a general, nondiscriminatory and otherwise valid law to effectuate a racially discriminatory policy of private business or agency, and the enforcement of such a discriminatory policy by State governmental organs, has been held repeatedly to be a denial by State Action of rights secured by the Fourteenth Amendment. Thus, in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, the judicial injunction was held violative of the Fourteenth Amendment. And, in *Barrows v. Jackson*, 346 U. S. 249, it 20

was held that such covenants could not be enforced, consistent with the Fourteeth Amendment, by the assessment of damages for their breach. In *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276, the Supreme Court held that the criminal courts could
21 not be used to convict of trespass persons exercising their rights of free speech in a privately owned company town.

The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877, 100 L. Ed. 774, 76 S. Ct. 133, affirming, 220 F. (2d) 386) golf courses; (*Holmes v.*
22 *City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141, reversing, 223 F. (2d) 93) park and recreational facilities; (*New Orleans City Park Improvement Asso. v. Detiege*, 358 U. S. 54, 3 L. Ed. (2d) 46, 79 S. Ct. 228, affirming, 252 F. (2d) 122) and theaters; (*Muir v. Louisville Park Theatrical Ass'n.* 347 U. S. 971, 98 L. Ed. 1112, 74 S. Ct. 783, reversing, 202 F. (2d) 275, and remanding for consideration in light of *Brown v. Board of Education*, 347 U. S. 483, and "conditions that now prevail").

23 A restaurant, like a theater, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. Federal Courts have held, therefore, that rights guaranteed by the equal protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Darrington v. Plummer*, 240 F. (2d) 922, certiorari denied, 353 U. S. 924.

When the state enforces or supports racial discrimi-
24 nation in a place open for the use of the general public, it infringes Fourteenth Amendment rights not-

withstanding the private origin of the discriminatory conduct. *Muir v. Louisville Park Theatrical Ass'n, supra.*

Nor, we submit, is it relevant that the property upon which discrimination occurs is privately owned. State laws which require or permit segregation of the races on privately owned intrastate motor buses are invalid under the Fourteenth Amendment. *Gayle v. Browder*, 352 U. S. 903, 1 L. Ed. (2d) 114, 77 S. Ct. 145; *Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752, appeal dismissed, 351 U. S. 901, 100 L. Ed. 1439, 76 S. Ct. 692. Racial discrimination by a privately owned place of public accommodation may also violate Fourteenth Amendment rights if such place is financially supported or regulated by the State, *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212, certiorari denied, 326 U. S. 721.

2. It is recognized that a formally "private" pattern of segregation is in the background of this case. However, no right of private property was distinctly asserted or claimed, and the connection between the "private" pattern and the independent police and judicial action remains vague.

It is respectfully submitted that any "private" pattern of segregation found in this case was infected with state power. The enforcement of obedience to the custom of segregation was the work throughout of the formal agencies of the state.

Appellants were not only "invited" but welcomed as cash customers everywhere on the premises of Taylor Street Pharmacy except at its lunch counter. (Tr. p. 23, ff. 90-91). The "property" right at stake was simply the right to segregate. Taylor Street Pharmacy and similar stores are a part of the public life of Columbia. The subjection of their policies to constitu-

tional control raises no real issues of individual privacy or freedom of association. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276.

29 The intervention of police support of the segregation pattern, and the invocation of the criminal prosecution machinery, are the immediate and obvious State involvements. "Whether the statute-book of the State actually laid down any such rule * * *, the State, through its officers, enforced such a rule; * * *" *Civil Rights Cases, supra*, 109 U. S. at 15.

But the deeper involvement of the State in this matter arises from two facts: (1) The proprietor of Tay-
30 lor Street Pharmacy like other stores in Columbia, was not acting on whim, or in obedience to personal taste as to association, but was following a custom that characterizes South Carolina as a community; (2) the maintenance of this custom, by law and other official action, is the policy of South Carolina as a political body.

The intervention of the police in this case was obviously based on their knowledge of the customary character of this segregation. There is not a scintilla
31 of evidence to rebut the inference that the segregation practiced by the Proprietor was a direct consequence, and indeed a part, of the South Carolina custom of public segregation of the race.*

The formally "private" segregation practiced as related in this case is therefore unbreakably connected with State law, for it is the creature of State custom. This course of action is not only touched by but permeated with the power of the State.

32

* It would serve no useful purpose to enumerate the statutes now in force which require racial segregation in South Carolina.

It is submitted that the quantum and kind of genuine "private" choice in this pattern is negligible, a mere bridge from statewide custom, fostered by State law and policy, into the State criminal machinery. It is submitted that "state action" permeates the entire pattern shown by this record.

B. *Were Appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?*

Appellants in peacefully taking seats at the "white" counters were solemnly expressing their belief that they were morally entitled to be treated on terms of full quality by the establishments that solicited and enjoyed their patronage at other counters. Such a nonverbal expression on a matter of solemn moment is in every way equivalent to speech and is entitled to constitutional protection. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88. It is entirely immaterial at this point whether they had a legal or constitutional right to enjoy unsegregated service; what is at issue here is something quite different, their right to indicate their conviction that in fairness they should be served.

Nor is there any problem of the accommodation between private property rights and the right of free expression, of. *March v. Alabama*, *supra*, for these appellants were convicted, though in name of trespass, in substance for being in a place reserved by custom for whites.

This case, then, constitutes state suppression of expression of appellants' dissatisfaction with the custom of racial segregation, with no valid state interest appearing.

Question II

Did the State fail to establish the corpus delicti or prove a prima facie case? (Exceptions 1, 2.)

It is felt that the observations made in reference to Question I above obviate the necessity for extensive argument here.

Appellants submit that the purpose behind their arrests and convictions as shown by the record and as heretofore treated in Question I must be considered as determinative of whether they actually committed any crime.

Appellants submit that the *corpus delicti* was not established.

CONCLUSION

For the reasons herein stated, the judgment of the County Court of Richland County affirming the judgment of the Columbia Recorder's Court should be reversed.

Respectfully submitted,

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

11-A

The State of South Carolina

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

HONORABLE JOHN W. CREWS, JUDGE

CITY OF COLUMBIA, Respondent,

against

SIMON BOUIE and TALMADGE J. NEAL,
Appellants

APPELLANTS' BRIEF

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

QUESTIONS INVOLVED

Question I

Did the Court err in refusing to hold that under the circumstances of this case the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3 and 4.)

A. Did the conviction of appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Constitution?

B. Did the application to appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionally protected right of freedom of expression?

Question II

Did the Court err in refusing to hold that the City failed to prove a *prima facie* case and failed to establish the *corpus delicti*? (Exceptions 1 and 2.)

STATEMENT

This is an appeal from an Order of Honorable John W. Crews, Associate Judge, Richland County Court, dated April 28, 1961, affirming convictions of the Appellants in the Recorder's Court of the City of Columbia.

Appellants were charged with the violation of Section 16-386 (Trespass) and Section 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended. In addition, Appellant Bouie was charged with Resisting Arrest. The charges arose out of the efforts of the Appellants to obtain lunch counter service in the store of Eckerd's Drugs, Incorporated, in Columbia, on the 14th day of March, 1960.

Trial by Jury was waived and Appellants were tried before Columbia Recorder John I. Rice on the 25th day of March, 1960. Appellants were found guilty of the charge of trespass and sentenced to pay fines of One Hundred ($100.00) Dollars or serve terms of thirty days, provided, however, that Twenty-four and 50/100 ($24.50) Dollars of each fine was suspended. Appellant Bouie was, also, found guilty of resisting arrest and received a sentence of payment of a fine of One Hundred ($100.00) Dollars or service of thirty days.[1]

Thereafter, by consent, the appeal from this trial was consolidated with a similar appeal from the Columbia Recorder's Court and was argued before the Richland County Court, Honorable John W. Crews, Associate County Judge, presiding. In the Order from

[1] Although it is not shown in the Transcript of Record of trial proceedings, the Recorder stated that he considered that the charge of trespass embodied the charge of breach of the peace and, hence, found defendants guilty only of trespass.

which this appeal is taken, the judgment of the Recorder's Court was affirmed. Due and timely notice of appeal from this Order was given.

ARGUMENT

Question I

Did the Court err in refusing to hold that under the circumstances of this case the arrests and convictions of Appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3 and 4.)

A. *Did the conviction of Appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Consitution?*

Testimony presented in this case is to the effect that Eckerd Drugs, Incorporated, is a large drug department store, the Columbia, South Carolina store being part of a chain that operates throughout the southern states (Tr. p. 19, ff. 75-77; Tr. p. 29, ff. 114-115). The store herein concerned invites the public generally onto its premises to do business, and serves all who respond to the invitation on an equal basis without regard to race or color at all departments of the store, except at the lunch department, at which Negroes are denied service (Tr. p. 30, f. 117). Here Negroes are excluded according to custom and practice of stores in the local area, according to the testimony of the store manager (Tr. p. 31, ff. 123-124).

As appellants approached the lunch counter area and proceeded to take seats, the area was roped off in an attempt to prevent their being seated. (Tr. p. 35, ff.

138-139). Appellants were served no food at the lunch counters, indeed, no one took their orders. Other persons, white, sitting in the same general area were served during the period appellants remained in the lunch area (Tr. p. 37, f. 147).

Shortly after appellants seated themselves in the lunch area, members of the Columbia police department arrived, at the request of the store management (Tr. p. 32, f. 127) and at the request of the store manager appellants were arrested.

With reference to the reason for the arrests, the arresting officer testified (Tr. p. 20-21, ff. 80-81):

> "Q. Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?
>
> A. Why certainly, I would think that would be the case."

The same officer had previously testified as follows (Tr. p. 12, f. 145):

> "Q. Before you go that far, Chief, why did you ask them to move?
>
> A. Because the manager, in my presence, had asked them to move, and it is my opinion that if he didn't want them in the store and he needed help, that it is my place to get them out."

It is respectfully submitted that appellants were convicted solely of not observing the custom of racial segregation. A change in name cannot make such a conviction less obnoxious to the equal protection clause of the Fourteenth Amendment. In everything but

name, appellants were convicted simply of not following the custom of segregation, and their convictions cannot be sustained without sustaining segregation by the direct force of state law and authority.

It goes without saying that South Carolina cannot make it a crime for a Negro to seek service at a counter reserved by custom for whites, for such a law is simply and solely a state law commanding segregation. *Gayle v. Browder*, 352 U. S. 903; *New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54; *Holmes v. City of Atlanta*, 350 U. S. 879. But that is exactly what the State has done here. South Carolina has made a given action "trespass" and under State law punishes this "trespass". It amounts to the very same thing as a law punishing this same action under a different name. As to appellants, the police and the courts proceeded to arrest and conviction on the clear theory that the mere presence of a Negro at a "white" counter was unlawful in itself. Clearly, this is proscribed State action.

The application of a general, nondiscriminatory and otherwise valid law to effectuate a racially discriminatory policy of private business or agency, and the enforcement of such a discriminatory policy by State governmental organs, has been held repeatedly to be a denial by State action of rights secured by the Fourteenth Amendment. Thus, in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, the judicial enforcement of private racially restrictive covenants by injunction was held violative of the Fourteenth Amendment. And, in *Barrows v. Jackson*, 346 U. S. 249, it was held that such covenants could not be enforced, consistent with the Fourteenth Amendment, by the assessment of damages for their breach. In *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276,

the Supreme Court held that the criminal courts could not be used to convict of trespass persons exercising their rights of free speech in a privately owned company town.

21 The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877, 100 L. Ed. 774, 76 S. Ct. 133, affirming, 220 F. (2d) 386); Golf course (*Holmes v. City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141, reversing, 223 F. (2d) 93); park and recreational facilities (*New Orleans City Park Improvement Asso. v. Detiege, supra;* and theaters (*Muir v. Louisville*
22 *Park Theatrical Ass'n*, 347 U. S. 971, 98 L. Ed. 1112, 74 S. Ct. 783, reversing, 202 F. (2d) 275, and remanding for consideration in light of *Brown v. Board of Education*, 347 U. S. 483, and "conditions that now prevail").

A restaurant, like a theater, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. Federal Courts have held, therefore, that rights guaranteed by the equal
23 protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Darrington v. Plummer*, 240 F. (2d) 922, certiorari denied, 353 U. S. 924.

When the state enforces or supports racial discrimination in a place open for the use of the general public, it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct. *Muir v. Louisville Park Theatrical Ass'n, supra.*

24 True, a formally "private" pattern of segregation is in the background of this case. However, it is submitted

that these "private" patterns are themselves infected with state power.

To begin, the "property" interest of Eckerd's was an exceedingly narrow one. Management not only "invited" appellants but welcomed them as cash customers on the premises, everywhere except at the lunch counters. The "property" right at stake was simply the right to segregate. Eckerd's a large drug department store, part of an area-wide chain, is a part of the public life of Columbia. The subjection of its policies to constitutional control raises no real issues of individual privacy or freedom of association. *Munn v. Illinois*, 94 U. S. 113; *Marsh v. Alabama, supra.*

State laws which require or permit segregation of the races on privately owned intrastate motor buses are invalid under the 14th Amendment. *Gayle v. Browder, supra; Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752; appeal dismissed, 351 U.S. 901. Racial discrimination by a privately owned place of public accommodation may also violate 14th Amendment rights if such place is financially supported or regulated by the state, *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212.

Justification for invasion of the right to be free from state enforcement of racially discriminatory practices can be supported, if at all, only where the constitutional right is subordinated to a countervailing right or interest so weighty as to occupy a preferred constitutional status. *Cf. Kore-matsu v. United States*, 323 U. S. 214. The narrow issue in the present cases is not whether the right, for example, of a homeowner to choose his guests (as is argued by the City) should prevail over appellants' constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interests of a pro-

prietor, or management, who has opened up his business property for use by the general public * * * in particular, by persons invited in to trade at numerous departments in drug stores * * * should so prevail.

Courts have long placed restrictions upon proprie-
29 tors whose operations are of a public nature, affecting the community at large. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."
30 *Munn v. Illinois, supra.*

In *Marsh v. Alabama, supra, at* 506, the Supreme Court similarly rejected the contention that the rights of a proprietor of property open to the public were coextensive with those of a homeowner. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ."

31 In *Freemen v. Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U. S. Law Week 2311), a Washington Court applied the *Marsh case* principle in rejecting the right of an owner of a shopping center to obtain an injunction from a state court restraining peaceful picketing on the privately owned sidewalks of a shopping center, noting that the owner had contracted away his right
32 to private and personal use and occupancy, emphasizing that interference with the owner's fundamental right of privacy was not involved because he had de-

voted his property for use by the general public. In April, 1960, the Superior Court of Raleigh, North Carolina, relying on the *Marsh* decision, dismissed trespass charges against Negroes who had been arrested for demonstrating on the privately owned sidewalks of a shopping center against segregated lunch counters 33
in the stores of the shopping center.

The concepts of "private property" and "state action", as Marsh illustrates, do not fall into neat, precise categories. In the final analysis, the determination whether private conduct has been so "panoplied" by governmental action, power, or support that it may fairly be judged by the standards of the 14th Amendment is, like so many questions of constitutional law, 34
one of proximity and degree. As has been already noted, we are here concerned not with an individual homeowner, but with a large department drug store, a part of a great chain, performing and providing essential public needs. While the facilities here may be distinguished from a company town, such as was involved in *Marsh v. Alabama*, or from the primary voting machinery involved in *Terry v. Adams*, 345 U. S. 461, 473, and *Smith v. Allwright*, 321 U. S. 649, it is submitted that the underlying rationality of those cases is equally applicable here. Eckerd's Drug Store 35
in Columbia, South Carolina, is not comparable to a home, or even to a corner drug store serving a limited clientele. Though privately owned, it is a City and State wide facility operated for the benefit of the public generally, in relation to which the broad constitutional principle of *Marsh v. Alabama* may properly be applied.

In this case, the State of South Carolina is intimately involved in the formally "private" segregation pattern 36
followed by Eckerd's. The intervention of police in

support of the segregation pattern, and the invocation of the criminal prosecution machinery, are the immediate and obvious state involvements. "Whether the statute book of the State actually laid down any such rule . . ., the State, through its officers, enforced such
37 a rule; . . . ." Civil Rights Cases, 109 U. S. 3, at page 15. But the deeper involvement of South Carolina arises from two facts: (1) Eckerd's, in segregating, was not acting on whim, or in obedience to personal taste as to association, but was following a custom that characterizes South Carolina as a community; (2) the maintenance of this custom, by law and other official action, is the policy of South Carolina as a political body.[2]

38 The only rational or imaginable ground for the "private" segregation followed by Eckerd's was obedience to state custom. Though this background fact is assumed rather than explicitly stated in testimony, its presence in the background can be inferred from the records, if such support be thought necessary in regard to a matter of such common knowledge. There is not a scintilla of evidence to rebut the inference that the segregation practiced here was a direct consequence, and indeed a part, of the South Carolina custom of
39 public segregation of the races.

The State of South Carolina as a community was thus indispensably involved in this segregation pattern. But South Carolina as a polity is in the same casual chain of involvement, for the State has given to the segregation custom the full support of state law and policy.

---

[2] It is submitted that the laws, statutes, official pronouncements
40 and policies of the State of South Carolina are so numerous and commonplace that this Court can take judicial notice thereof, and that it is unnecessary to unduly prolong this brief by enumerating same.

The formally "private" segregation practiced in this case is unbreakably connected with state law, for it is a creature of state custom, and the support of that custom is itself the keystone policy of South Carolina as a political entity. This course of action is not only touched by but permeated with the power of the state.

If the element of "private" choice be thought material on this record, appellants insist that the quantum and kind of genuine "private" choice in this pattern is negligible, a mere bridge from statewide custom, fostered by state law and policy, into the state criminal machinery. No private interest of the proprietors of Eckerd's is at stake, other than the gain they may look to from following the state-festered segregation custom.

B. *Did the application to appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionality protected right of freedom of expression?*

There can be no serious doubt that appellants, in peacefully[3] (Tr. p. 9, ff. 33-35; p. 35, ff. 137-139; p. 41, ff. 161-162), taking their places at the "white" counters, were solemnly expressing their belief that they were morally entitled to be treated on terms of full equality by the establishments that solicited and enjoyed their patronage at other counters.[4] (Tr. p. 41, f. 162; p. 55, f. 217). Such a non-verbal expression on a matter of solemn moment is in every way equivalent

[3] It is to be noted that appellants were charged, also, with breach of peace. While the record is silent as to the disposition of this charge, they were found guilty only of trespass (Tr. p. 62-63, ff. 248-249). It is submitted that the record is barren of any evidence of breach of the peace by these appellants.

[4] In the light of the enormous publicity given "sit-in" activities throughout the Nation and State over the past eighteen months, it is submitted that the Court can take judicial notice of the manner of conduct and expressed purpose of participants therein.

to speech and is entitled to constitutional protection. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88. Involved here is their right to indicate their conviction that in fairness they should be served. Their expression was completely peaceful,
45 and was exactly adapted to time and place.

We have here a very clear suppression and penalization of expression, by state authority. No valid state interest appears in this case to overbalance the extremely weighty Fourteenth Amendment interest in personal freedom of expression. The only assertable state interest implemented by these convictions is the interest (abundantly evidenced in the case of South Carolina) in the maintenance of segregation. But this
46 interest can have no constitutional standing, for it takes effect only (as here) as a form of the use of state power to support segregation.

It is submitted that this case constitutes state suppression of expression, with no state interest appearing.

Question II

Did the Court err in refusing to hold that the City failed to prove a prima facie case, and failed to establish the corpus delicti? (Exceptions 1 and 2.)

47 In addition to the charges of trespass and breach of the peace, appellant Bouie was charged with resisting arrest. The testimony is conflicting concerning events that gave rise to the latter charge. It is submitted, however, that taking into consideration all circumstances of this incident, the City has utterly failed to present evidence to support a conviction for resisting arrest.

48 On direct examination the arresting officer testified (Tr. p. 3, ff. 12-14):

"A. . . . that was in my presence, so then I told them both that the manager wanted them out and they should go on out, and this boy on the other side there, Bouie, said, 'For what?' I said, 'Because it's a breach of the peace and I'm telling you the second time to go on out.' He said, 'Well, I asked you for what?' So at that time I reached and got him by the arm. Neal here had started to make an effort to get up but the other boy had not, and I had to pull him up out of the seat, so I stood them up and made a preliminary frisk, which we usually do to see if they had any weapons on them and I found none. Then I caught him in the belt, his belt and his breeches.

Q. You were in back of him at that time?

A. I was in back of him. Pretty much my whole body was covering him, because he had been told that he was under arrest if he didn't move, but he told me, he said: 'Don't hold me, I'm not going anywhere' and I said: 'Boy that's my privilege, go ahead' so we had gone out a few steps, three, four or five yards, he started pushing back, and he said: 'Take your hands off me, you don't have to hold me' . . . and I kind of tiptoed him and got him out in that position."

On cross examination, this same witness testified (Tr. p. 15, f. 57):

"Q. Tell us again what happened?

A. When I asked him the second time, or at least told him the second time, and I reiterated: 'I'm telling you the second time to getup and come on out of here, because you are under arrest,' this boy sitting on my left, he did make a move in the seat, apparently closing his book and started to

get up but the other boy (later identified as appellant Bouie) never did make any move at all to get up."

And again this witness testified on cross examination (Tr. p. 15, f. 60):

"Q. Tell us again what happened. I'm not really too clear, Chief, as to what you said.

A. I said: 'I'm asking you the second time' and he still didn't make any move and I caught him by the sleeve of the coat and lifted him up out of the seat."

This witness testified that the only physical resistance exhibited by the appellant was the fact that the witness found it necessary to "pick him up out of the seat," (Tr. p. 17, f. 68); that appellant "pushed back later on going out," (Tr. p. 18, f. 69); that in the opinion of the witness, there was no place for appellant to go other than with the arresting officer and that the resistance was the failure of the appellant to immediately move from the seat in the lunch area (Tr. p. 18, ff. 70-71). We think it significant that this arresting officer flatly refused to answer the question when asked on cross examination how much time did he allow for appellant to move as directed before pulling him from the seat for "resisting", and direct the Court's attention to the ruling of the trial Judge (Tr. p. 16, f. 62).

On direct examination, appellant Bouie testified as follows (Tr. p. 51, ff. 201-206):

"Q. When Chief Griffith said 'You are under arrest' what, if anything, did you do?

A. Well, when he said that I was under arrest, I asked him orally why, and physically I began to gather my books.

Q. Did you make any effort to arise?

A. Yes, sir.

Q. At the time you made such an effort, what was Chief Griffith doing?

A. Chief Griffith was standing there, and when I was making an effort to come, to get up to go, he didn't lift me. I know the difference between lifting and snatching. He snatched me from the booth. I had my book in my hand at the time he snatched me. I had my book in my hand, so I gathered my book when he snatched me, very briefly, and he gave me the regular patting down, I don't know what you call it, and following then he grabbed me by the seat of my pants and a gentleman as large as this gentleman, with a fellow my size and very timid,[5] I couldn't have run.* * * I couldn't do anything but go with the gentleman, and the only remark I said to the gentleman, after he pulled me by my belt, I said to him, 'That's all right, Sheriff, I'll come on' because I didn't want to make any scene because I knew the reporters were there and I didn't want anything to even look violent. Those were the only remarks I made to him after he pulled me by my belt.

Q. I'll ask you whether or not you resisted Chief Griffith in any manner?

A. Oh, no, sir.

Q. When he placed you under arrest?

A. No, sir.

Q. I'll ask you whether or not you went along with him voluntarily and without the necessity of the assistance which he gave you?

* Chief Griffith, the arresting officer is above six feet in height and weighs well over two hundred pounds. The appellant Bouie is approximately five feet, six inches tall, and weighs approximately one hundred thirty-five pounds.

A. Repeat that again?

Q. I'll ask you whether or not you went along with Chief Griffith voluntarily?

A. Yes, sir, I went along with him voluntarily.

61 Q. I'll ask you whether or not it was necessary for Chief Griffith to apply force to take you with him?

A. Oh, no, sir, No, sir."

Appellant's testimony on cross examination and redirect examination was as follows (Tr. p. 57, ff. 226-228; p. 58, f. 230):

"Q. In other words, that's when he pulled you up out of the seat?

62 A. Yes, sir.

Q. And he frisked you?

A. Yes, he did.

Q. And he grabbed you by the belt?

A. Yes, sir.

Q. Now, after he grabbed you by the belt, didn't you tell him to take his hands off you?

A. Oh, I didn't tell the Chief that. Definitely not.

63 Q. Didn't you try to push back away from him?

A. Oh, sir, as big as that man is, if you want to go through the procedure and see how difficult it would be, I've never been arrested before, I've never been jerked by my pants as some criminal before. He came and he pulled me by the seat of my pants. Now, normally I couldn't do anything but follow him, he pushed me.

Q. You deny that you tried to get away from 64 him?

A. Yes, sir, I deny that.

Q. Or that you pushed back against him?

A. I deny that.

. . . .

Q. Just answer my question. Did you say that or not?

A. I told him these exact words; I said 'You don't have to hold me. I will come, sir.'

By Mr. Perry:

Q. And having stated your reply to the questions of the City Attorney, that you were prepared to be arrested if need be, state whether or not you were willing to go along with Chief Griffith?

A. Yes, sir."

In addition to the foregoing, the City sought to show throughout this trial that appellants welcomed being arrested and jailed; and appellants admitted that they were perfectly willing to be jailed for their convictions that they have a right to be served in the lunch counter area on an equal basis with others without regard to race or color (Tr. pp. 43-45; ff. 170-176; p. 55, ff. 218). It is submitted that this Court can take judicial notice that the history of the so-called sit-in demonstrations, indeed, of all the protest demonstrations, throughout this country over the last two years proves that the participants are governed by their beliefs in non-violence, passiveness. In the light of this, and the rule that the evidence must be resolved most favorably towards the appellant, it is manifest that appellant Bouie offered no resistance to the arresting officer.

True, resisting lawful arrest is one form of the common law offense of obstructing justice, and the offense is not defined by statute in this State. It may be true that the offense "may be merely passive, for the use

of force is not an essential ingredient of the common law offense" as stated in the majority opinion of this Court in *State v. Hallman*, 102 S. E. (2d) 873, 232 S. C. 489, and that "any obstruction of lawful process, whether it be by active means or by the omission of
69 a legal duty, is an indictable offense," as is stated in the minority opinion of the same case, quoting as authority therefor *State v. Hailey*, 2 Strob. 73. But we view it as significant that all the cases dealing with resisting arrest that we are able to find cite no authority for the said propositions and deal with circumstances of actual obstruction and resistance.

From the circumstances of this case, it is submitted that the appellant Bouie exhibited no conduct at all
70 that can legally be classified as resistance to arrest. He was not even disobedient; at most he failed to move as fast as the arresting officer thought he should. "Resist" * * * is not synonymous with "disobedience"; for, "while resistance embraces the former, it implies much more, and requires an active element of opposition to authority in any connection with the refusal or neglect to obey." *U. S. v. Huff*, 13 F. 630, 639.

We believe that the treatment of Question I adequately disposes of all other issues raised by Ques-
71 tion II.

CONCLUSION

For the reasons herein stated, the judgment of the County Court of Richland County, affirming the judgment of the Columbia Recorder's Court, should be reversed.

Respectfully submitted,

JENKINS & PERRY,

72 Columbia, S. C.

Attorneys for Appellants.